

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-7292, 7391

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

v.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING
PETITION FOR REHEARING *EN BANC*

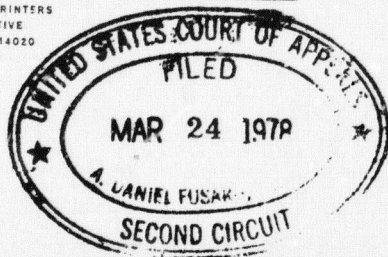
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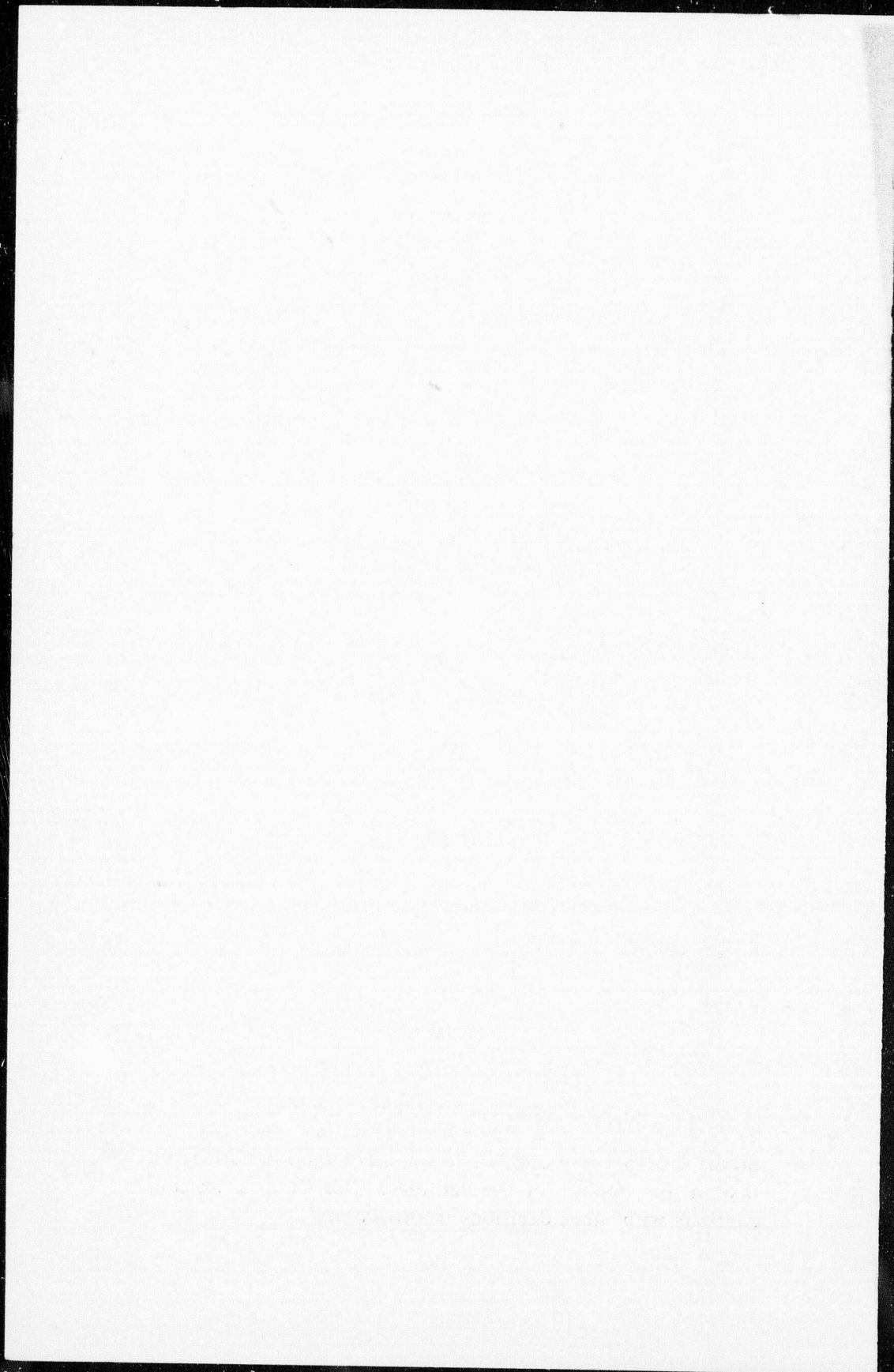
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IN THE
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For the Second Circuit

Docket Nos. 76-7292, 76-7391

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

v.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellants.

**PETITION FOR REHEARING
PETITION FOR REHEARING *EN BANC***

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The Members of the Buffalo Common Council Defendants-Appellants herein respectfully petition this Court pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure for a rehearing or in the alternative for a rehearing *en banc* of the March 8, 1978 decision in the instant case of a Panel composed of Judges Kaufman, Smith and Mulligan. The Panel's decision affirmed as to the City Defendants the April 30, 1976 decision of the United States District Court for the Western District of New York but reversed as to the State Defendants. The grounds for this Petition are that the Panel misapprehended various points of law and for the further reason that, in the opinion of the Petitioner, this Court's decision conflicts with other decisions in this circuit.

I. MISAPPREHENSIONS OF LAW

A. The Panel Misapprehended the Legal Responsibilities With Respect to Education of the State and City Defendants and Thus Improperly Imputed to Them Responsibility for Segregation in the Buffalo Public School System.

We assume for the purpose of this argument the validity of the vigorous presentation made by the Panel of the *Hart* standard in determining segregative intent. We note that a similar formulation has been endorsed by the Seventh Circuit Court in consideration of the Indianapolis case (See *United States of America, et al. v. Board of School Commissioners of the City of Indianapolis, Indiana, et al.*, decided February 14th, 1978).

However, even assuming the validity of that standard, we strongly urge this Court to reconsider its appraisal of the responsibility of the parties for segregation in the Buffalo Public School System.

(1) The Legal Responsibilities for Education of the Board of Regents, Commissioner of Education and the Common Council of the City of Buffalo.

The powers of the Board of Regents and the Commissioner of Education are described in Judge Curtin's Decision and the stipulation between the parties (A-1133; A-120). Full power over education is constitutionally vested in the State and specifically in the Department of Education which "is charged with the general management and supervision of all public schools and all of the educational work of the State," NY Education Law, Sec. 101. The Appellant Board of Regents is the governing body of the University of the State of New York, NY Education Law, Sections 201 and 202. The Board of Regents is also the statutory head of the Department of Education, and the Commissioner of Education, who

serves at the pleasure of the Board of Regents, is the chief administrative officer of the department, NY Education Law, Sections 101 and 303.

The Commissioner has the responsibility for enforcing all laws relating to education and for executing all educational policies adopted by the Board of Regents. He has general supervision over all elementary and secondary schools, including those in the public school system of Buffalo (Stip. Par. 132(b); A-120). The Commissioner is also granted judicial authority to hear appeals from aggrieved persons, and his decision "shall be final and conclusive, and not subject to question or review in any place or court whatever," NY Education Law, Section 310 (A-1134); and the Regents may adopt rules giving the Commissioner such additional powers and duties as may be required for the effective administration of the State system of education, NY Education Law, Section 301.

Section 306 of the NY Education Law gives the Commissioner the power to remove any school officer or member of a board of education who willfully disobeys any decision or order of the Commissioner of Education and to withhold from any district or city its share of the public money of the State for such disobedience (Stip. Par. 132(c); A-120).

The Board of Education for the City School District for the City of Buffalo, New York is a creature of State law and its members perforce are State officers. Board of Education members are not agents of the City government nor can the City exercise control over them.

The Common Council of the City of Buffalo is the City's legislative body and by virtue of State law cannot exercise any legislative role in the formulation of educational policies in the City of Buffalo. Although required by law to make an annual lump sum appropriation to the Board of Education so

that the Board can discharge its responsibility to the pupils of the Buffalo Public School System, the New York State Education Law and the State courts make it clear that the Common Council cannot mandate how the Board of Education is to use the money (See Section 2576 of the NYS Education Law and *Fuhrman v. Graves*, 235 NY 77, 138 NE 743 [1923]).

It is not our purpose in this proceeding to attempt to rebut this Court's nor the District Court's finding of segregative intent in the formulation of attendance zones, transfer policies, etc., by past boards of education. We wish to bring to this Court's attention, however, the fact that under New York State law, neither the Common Council nor other City officials had the power to object to or correct these judicially declared acts of discrimination. The Panel, in its March 8, 1978 decision, treated the Buffalo Board of Education and the City of Buffalo's Common Council as a single entity, the "City Defendants". They concluded that it is difficult "to imagine a set of facts, short of public admission of wrong doing, which would be more suggestive of intentional discrimination." Almost every act enumerated by this Court to substantiate this statement was a policy of the Buffalo Board of Education and as such was not subject to the control of the Common Council or other City officials.

It is clear that in New York State education is a State function with the ultimate responsibility vested in the Board of Regents and the Commissioner of Education. The City of Buffalo cannot be held derivatively liable for any judicially determined segregative acts of the Board of Education.

(2) This Court Applied Inconsistent Standards of Intent to the City and State Defendants which Conflicted with this Court's Decision in the *Hart* case.

In finding the Buffalo Common Council guilty of segregative intent, both this Court and the Trial Court relied

heavily upon the Common Council's failure to adequately fund programs which would have encouraged racial integration. Although the Council's record with respect to funding may be poor, the culpability of the Board of Education established by the Court must also be considered. Only sheer speculation could lead one to the conclusion that if additional funds had been provided to the Board, they would have been used by the Board to desegregate the Buffalo Public School System.

This Court and the District Court applied a strict "foreseeable consequences" test from this Court's prior decision in *Hart*. While it may reasonably be maintained that there was substantial evidence of overt bigotry in occasional actions by the Common Council, as was revealed in the portable classroom controversy, no causative relationship was shown between that unworthy conduct and the segregated character of the school system.

This Court in analyzing the Commissioner of Education's role, inadvertently perhaps, applied a less demanding standard than enunciated in *Hart*.

Referring to the State's role, the Panel quoted this Court's previous decision in *Hart*:

"We assume mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation. To argue otherwise would be to adopt the strictly objective view of segregative intent . . . in effect making all continued toleration of segregation *de jure*."

This statement is correct in a situation where there is mere inaction and no corresponding duty to act. This Court in Judge Gurfein's opinion in *Hart v. Community School Board of Education, New York School District No. 21*, 512 F 2d 37 (2 Cir 1975) differentiated between "mere inaction without any af-

firmative action" and "omissions made by governmental authorities" (P. 50) or "inaction in the face of tendered choice." (P. 51). The instant case presents a clear situation of a government omission or failure of the State Defendants to fulfill an affirmative obligation to act. If the Buffalo Public School System was guilty of segregating its schools, then the Commissioner had a duty to enforce the federal and state Constitutions and the policy statements of the Board of Regents with respect to segregation in New York State schools. The record shows that the Commissioner was well aware of his powers under section 306 of the NYS Education Law and yet his office failed to use these powers.

The Commissioner's Office was given choices of actions which could have resulted in less segregation of the Buffalo Public School System and refused to take those actions. If as this Panel found, the District Court did not err in finding that given the chosen policies of the state appellants, it was foreseeable that the Buffalo schools might remain segregated for an extended period of time, then applying the standard enunciated in *Hart*, the finding of the trial court that:

"In the final analysis, the State defendants are entrusted with the authority over and responsibility for the educational system in New York State. They must be held accountable for their actions and omissions that allowed and encouraged the BPSS's increasingly severe segregation [A-1169]"

should be affirmed.

The Panel used a very subjective test when considering the inaction of the Commissioner of Education. The Court refers to the personal health of the Commissioner and "legitimate policy considerations" for absolving the Commissioner of any responsibility.

The Commissioner of Education heads a large department with an extensive administrative staff. As Judge Curtin stated in his opinion:

"Mr. Nyquist's excuse for not having brought a show cause order to make the *Yerby Dixon* decision a final order, that he was incapacitated by a heart attack, is not persuasive. The State's authority cannot be so dependent on the health of any one person, and New York State law authorizes the Deputy Commissioner to fill in for a disabled Commissioner."

The Panel's subjective consideration of one official's role and excuses should not be determinative of the State agency's intent and is contrary to this Court's expressed standard of intent.

The Seventh Circuit Court of Appeals in its order on remand from the United States Supreme Court decided February 17, 1978 in the case of *US v. Board of School Commissioners of the City of Indianapolis* made this formulation employing the *Hart* standard:

"It is clear, therefore, that discriminatory purpose for constitutional analysis is to be gleaned not from individual officials but from the relevant governmental institutions. As a subjective test would be impossible to apply in such circumstances, the courts are driven to adopt an objective criterion in determining whether the challenged state action is imbued with a segregative intent or purpose. Such criterion must include an examination of the institutional policy that underlies the action."

There is no evidence in the record of any "legitimate policy consideration" that would allow the Commissioner to do anything other than what was found by the Trial Court to be his express duty in the circumstances. Judge Curtin found upon reconsideration that:

"from the Commissioner's actions over this extended time period, that contrary to the lip service paid integration, he intended that the situation continue unabated." (A-1325).

This Court and the Seventh Circuit have spoken out against a purely subjective test. The Seventh Circuit in its recent *Indianapolis* decision, stated:

"[A subjective] test would pose an impenetrable evidentiary barrier for plaintiffs, for in an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find. Because a subjective test fails to measure the presence of discriminatory purpose when officials act discreetly, it is an outdated tool in the enforcement of the Equal Protection Clause."

The Seventh Circuit Court like this Circuit Court in *Hart* recognizes the ultimate reality that in a world like ours which demands effective action in the face of formidable illegal challenge, words are not enough.

In conclusion, it is clear that there is no adequate explanation in the record for the Commissioner's failure to implement the Board of Regent's 1962 Desegregation Policy during the many years since that time.

Conclusion

This request for review of the Panel's decision is of exceptional public importance because of its far-reaching effect on the operation of the Buffalo Public School System and the entire City of Buffalo. The responsibilities of the City's Common Council and the State defendants should be clarified and fully considered by the entire Court or reconsidered by the Panel. The apparent conflict in the standard of intent used by the Panel must be further considered and explained.

For the foregoing reasons, Petitioner respectfully requests that this Court grant this Petition for Rehearing *en Banc* or in the alternative grant a Rehearing by the original Panel.

Respectfully submitted,

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Dated: Buffalo, N.Y., March 21, 1978.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee)
City of Batavia)

ss. :

George Arthur et al vs. Ewald P.
Nyquist et al
76-7292, 76-7391

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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Leslie R. Johnson

Sworn to before me this

22nd day of March, 19 78

Patricia A. Lacey
PATRICIA A. LACEY

NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979

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